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SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-201

SILVER CREEK PACKING CO.,
A CORPORATION,

Petitioner,

vs.

RAY MARSHALL, SECRETARY
OF LABOR, U.S. DEPARTMENT
OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Ninth Circuit

QUESTION PRESENTED

Whether the Ninth Circuit erred in deciding that the Petitioner did not qualify for the exemption found in 7 U.S.C. Section 2042 (b)(2) of the Farm Labor Contractor Registration Act of 1963, as amended.

OPINION BELOW

The order and decision of the Federal District Court, Eastern District, of the State of California and the United States Court of Appeals for the Ninth Circuit appear in the attached appendix.

JURISDICTION

The Order of the Court of Appeals for the Ninth Circuit, was entered on March 25, 1980. Thereafter the petitioner sought and was granted by this Court an extension until August 8, 1980, in order to file the instant Petition for Writ of Certiorari. Said Order extending time was granted on June 12, 1980 by the Honorable William H. Rehnquist, Associate Justice of the Supreme Court. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Statute involved is 7 US Code 2041 et. seq. which appears in the attached appendix.

STATEMENT OF THE CASE

The Petitioner, Silver Creek Packing Company, repectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Ninth Circuit entered in this proceeding on March 25, 1980.

The instant case presents an issue of first impression before this Court. Namely, whether a corporate packing shed operator may qualify for the exemption set forth in 7 U.S.C. §2042 (b) (2) of the Farm Labor Contractor Registration Act, (Hereinafter referred to as FLCRA or the Act.) which specifically excludes a packing shed operator from registering as a farm labor contractor when it personally employs migrant farm workers solely for [its] own operation.

This issue has been the focus of protracted litigation in the State of California among the various federal district courts, **Marshall v. Silver Creek Packing Co.** 83 CCH Labor Cases ¶ 33, 615 (E.D. Calif., Aug., 1977); **Marshall v. Green Goddess Avocado Corp.,** 84 CCH Labor Cases ¶ 33, 712 (S.D. Calif., 1978); **Marshall v. Souza Bros. Packing Co., Inc.,** 83 CCH Labor Cases ¶ 33, 625 (C.D. Calif. 1977); **Marshall v. Mupu Citrus Association,** 84 CCH Labor Cases ¶ 33, 707 (C.D. Calif. 1978); **Marshall v. Paramount Citrus Association, Inc.,** No. 79-3192 (C.D. Feb. 1979) and **Marshall v. Santa Clara Produce, Inc.,** No. 79-3185 (C.D. Feb. 1979), as well as before the Ninth Circuit Court of Appeals. **Marshall v. Coastal Growers Association,** 598 F. 2d 521 (9th Cir. 1979); **Marshall v. Green Goddess Avocado Corp.,** _____ F. 2d _____ (9th Cir. March 25, 1980); **Marshall v. MUPU Citrus Association,** ———F.2d——— (9th Cir. 1979); **Marshall v. Souza Bros. Packing Co., Inc.,**

____F.2d____ (9th Cir. March 4, 1980); and **Marshall v. Point Sal Growers and Packers,** _____F.2d_____ (9th Cir. 1979). Decisions of the federal district courts are as divided as is the Ninth Circuit with respect to the meaning and application of the above exemption.

Silver Creek Packing Company is a California corporation with its place of business located at Mendota, California. Testimony of William Johnstom (R.T. 5:15; 6:2) Hereinafter all references to R.T. will be the Testimony of William Johnston.

Silver Creek is a for-profit commercial corporation and not an association or cooperative (R.T. 8:18; 8:19). It is liable for its losses and determines what to do with its profits. The nature of Silver Creek's business is in the harvesting, hauling, packing, selling and shipping of melons in California's San Joaquin Valley (R.T. 5:22; 17:22-25; 18:1-20; 19:1-4).

With respect to Silver Creek's employees, it personally hires and employs migrant workers in its operation (R.T. 19:15-16; Findings of Fact Paragraph 5). It retains these employees to do harvesting operations in the hopes of realizing a profit for its activities. It hires and employs these workers solely for its own operations. Defendant in no way acts as a middleman.

With respect to its customers, Silver Creek enters into marketing agreements with melon growers (R.T. 9:23-25, 10:1-3). The provisions of the Marketing Agreement give Silver Creek control over all facets of the harvesting, hauling, packing shipping and sale of the melons. In

connection with these services, Silver Creek also determines the variety of melon seed to be planted by the grower and, for a charge, furnishes the seed. Silver Creek likewise determines the planting date and final irrigation date for the grower. Silver Creek does not limit these agreements to its shareholders. It deals with its shareholders and non-shareholders alike on the same basis (R.T. 9:22).

As soon as the melons are mature and ready for harvesting, Silver Creek takes possession and control over the melon corp, determines the order in which the growers' fields are to be harvested, when the harvest is to begin, and the day-to-day harvesting schedule (Finding of Fact, ¶ 9, T.R. 104). Silver Creek hires all of the agricultural workers that are engaged for the harvesting of melons, (Silver Creek's Responses to Request for Admission, Nos. 4-6, T.R. 16), and is responsible for all supervision of the work activity of harvest crews and for all daily harvesting decision (R.T. 16:18-21). The growers do not have control over any aspect of the harvesting or hauling operations (R.T. 16:22-24; R.T. 17:2-8). Thus, the harvest is an integral part of Silver Creek's total operations.

Silver Creek's employees haul the commodities in Silver Creek's vehicles and trailers to its packing shed (R.T. 15:25; 17:1-3). Silver Creek has complete control and supervision over the packing and selling of the commodities. The growers have no control over these functions (R.T. 18:2-21). Silver Creek assumes the risk of loss in the event the melons are damaged or destroyed

after it has taken possession of the melons (R.T. 18:2-25). It also assumes the risk of loss for the harvest expenses (R.T. 26:25; 27:1-6). For example, if the sales price of the melons is not sufficient to cover the expenses of harvesting, hauling, packing, selling and shipping, Silver Creek absorbs the loss. Lastly, all melons harvested by Silver Creek are sold and shipped under Silver Creek's own label (R.T.13:24-25; 14:1-4). In that regard Silver Creek makes all sales decisions whether to sell or not to sell, to whom to sell. It determines price, terms, method of pay. This sales function is also under Silver Creek's total control (R.T. 17:22-25; 18:1-9).

Silver Creek does all of the above as part of an integrated operation designed to produce a profit for its own operation.

The Secretary of Labor instituted the seminal action by a complaint filed on January 29, 1976 under 7 US Code 2050(C) of the Farm Labor Contractor Registration Act to enjoin the defendant-Appellant (hereinafter Silver Creek) from continuing to violate the Act by engaging in farm labor contractor activities without having first obtained a certificate of registration from the Secretary of Labor. By way of defense, Silver Creek alleged that it was exempt from the registration requirements of Section 4(a) of the Act [7 U.S.C. §2043(a)] by reason of the fact that Section 3 (b) (2) of the Act [7 U.S.C. §2042 (B) (2)] defining "farm labor contractor", reads in relevant part as follows:

"As used in this chapter . . .

(a) The term 'person' includes any individual, part-

nership, association, joint stock company, trust or corporation.

(b) The term 'farm labor contractor' means any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment. **Such term shall not include . . .**

(2) any farmer, processor, canner, ginner, **packing shed operator,** or nurseryman who personally engages in any such activity for the purpose of supplying migrant workers solely for his own operation.

. . ."] excludes packing shed operators who personally hire migrant workers solely for their own operation.

The District Court held, **inter alia,** that Silver Creek was exempt from registrationby reason of Section 3 (b) (2) of the Act since it personally hired migrant workers solely for its own melon packing operation. The Department of Labor filed a timely appeal to the Ninth Circuit Court of Appeals. In its appeal the Department of Labor raised two issues:

1. Whether a corporate packing shed operation which engages if farm labor contracting activities through its agents performs such activities "personally" within the meaning of amended Section 3(b)(2)?
2. If a corporate packing shed can engage in farm labor contracting activity "personally," whether it does so "solely for its own operation" where the

grower maintains a direct economic interest in the crops harvested by the migrant workers which are supplied by the shed?

With respect to the first interrogartory posed by the Secretary of Labor (hereafter Secretary), the Court specifically rejected the Secretary's argument that Silver Creek does not "personally" engage in labor contracting. The Court noted as follows:

> "We reject the Secretary's argument that Silver Creek does not "personally" engage in labor contracting. The arguments presented on this issue are indistinguishable from those raised by the parties in **Marshall v. Green Goddess Avocado Corp.,** _____ F.2d_____ (9th Cir. 1980), decided this day. For the reasons guiding our holding in that case, we find that Silver Creek, as a corporation, can, and does, "personally" hire farm laborers." _____F.2d at_____ (9th Cir. 1980).

However, the Court found in favor of the Secretary as to the second interrogatory, **supra.** In rejecting Silver Creek's argument that it personally hired migrant workers "solely" for its own operations, the Court held that since the growers who received Silver Creek's labor services were receiving a "direct benefit", and secondly, that these same growers were "dependent on Silver Creek's farm labor contracting, that those activities cannot be 'solely' for the corporation's [Silver Creek's] own operations."

Thus, since Silver Creek does not satisfy **both** the requirements of Section 3(b)(2), in that it must "personally" engage in labor contracting "solely for its own operations", the Court held that Silver Creek is not exempt from the registration requirements of the Act.

ARGUMENT

I

SILVER CREEK ENGAGES IN FARM LABOR CONTRACTING ACTIVITIES "SOLELY" FOR ITS OWN OPERATIONS" AND DOES NOT ACT AS A MIDDLEMAN BETWEEN GROWERS AND ITS AGRICULTURAL EMPLOYEES

A. Silver Creek is not a Middleman between Growers and Agricultural Workers

The intent of Congress in passing the Farm Labor Contractor Registration Act was to regulate and control the farm labor contractor - the crew leader or the crew pusher who in his capacity as a "bridge or middleman" was guilty of exploitation, not only of the workers themselves, but of the farmers, packers or processors (7 U.S.C. §2041(a).

The intent of Congress to so limit the application of this law is made clear by the 3 (b) (2) exclusion which excepts from the definition of "farm labor contractor", "any

farmer, . . . packing shed operator" who recruits or hires harvesting labor "solely for his own operation". The language, "solely for his own operation", is intended to limit the exclusion so that a farmer, processor, or packing shed operator who utilizes agricultural labor for his own operation is not acting as a bridge or a middleman between the workers on the one hand and another farmer, packer or processor on the other hand.

With respect to the intent of Congress, the following explanation contained in Senate Report No. 93-1295 dated November 21, 1974, is enlightening:

> ". . . the primary users of such labor - farmers, growers, and packing shed operators, have experienced great difficulty in obtaining a sufficient supply of agricultural labor either directly or through the offices of the United States Employment Service.
>
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>
> The result has been the emergence and evolution of the farm labor contractor to a position of prominence as the primary supplier of agricultural labor. Although the specific functions of the farm labor contractor, often called a 'crew leader' or 'crew pusher' might vary from job to job, his role essentially remains the same - a bridge between the operator (here 'operator' refers to farmers, processors and packing shed operators) and the worker . . .

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Because of thse factors, the contractor has been permitted to exercise an inordinate amount of leverage over the workplace situation. The contractor's unchallenged bargaining position is clearly one of detriment to both the farmworker and operator. (Here 'operator' refers to farmers, processors and packing shed operators.) Patterns of abuse have been well documented in Congressional hearings over the years.

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It is unfortunately all too common an experience for workers to be abused by farm labor contractors. Testimony revealed that in many cases the contractor exaggerates conditions of employment when he recruits workers in their home base, or that he fails to inform them of their working conditions at all; transports them in unsafe vehicles; fails to furnish promised housing, or else furnishes substandard and unsanitary housing; operates a company store while making unitemized deductions from workers' paychecks for purchases, and pays the workers in cash without records of units worked or taxes withheld . . .

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In 1963 Congress sought to remedy some of these abuses by enacting the Farm Labor Contractor Registration Act. In essence, that Act requires that all contractors or 'crew leaders' be registered with the Secretary of Labor, upon a showing of moral and fiscal responsibility."

Also of great significance is the general description of a farm labor contractor found in subsection 41.17(a) of the Interpretive Regulations issued by the Department of Labor following the enactment of the law in 1964 (29 C.F.R. 41.1 **et. seq.**). This section emphasizes the point that **the persons intended to be regulated are those who occupy the role of a middleman between the farmer or the packing shed operator on the one hand and the agricultural worker on the other.** This regulation provides:

"The exemption of section 3(b)(2) of the Act applies to 'any farmer, processor, canner, ginner, **packing shed operator,** or nurseryman' who engages in farm labor contracting activities 'for the purpose of supplying migrant workers solely for his own operation.' The Act was intended to regulate the practices of all persons functioning in the capacity of **middlemen between the farmer, processor, etc., and the migrant worker . . .**" (Emphasis added.)

In considerating the wide variation of practices among

growers, and packing shed operators, it is respectfully requested that this Court note the following range or spectrum of relationships between operators and farm labor contractors:

(1) A grower plants, grow, cultivates, harvests, packs, processes, ships and markets an agricultural commodity all as a part of a single integrated operation.

(2) A grower harvests the crop and delivers it to the packing shed operator who then proceeds with the packing, shipping and marketing.

(3) The packing shed operator harvests the crop, packs or processes it, ships it, and markets it all as a part of an integrated operation.

(4) The packing shed operator owns the land, plants, grows, cultivates, harvests, packs, ships and markets the agricultural crop, all as a part of a single integrated operation.

(5) The packing shed operator enters into growing contracts with farmers whereby the packing shed operator takes title to the crop prior to harvest and then harvests, packs, ships and markets the agricultural crop all as part of a single integrated operation.

(6) Neither the grower nor the packing shed operator does any of the harvesting, but one or the other employs a farm labor contractor who does the harvesting.

Only in the **sixth** situation is there a bridge or a middleman involved, and this is the only situation which Congress intended to regulate as was explained by the Committee Report and by the Department of Labor

regulations cited above.

A middleman is not involved where either the grower or the packer directly hires, controls and supervises the harvesting labor. In these cases such grower or packer is the employer of the labor. It assumes all the obligations arising out of the employer-employee relationship. It controls and supervises the labor and uses it in the part of the spectrum which constitutes its operations.

It is arbitrary and unrealistic to hold that the harvesting done by a packer or processor, such as Silver Creek, is not "for his [its] own operation" when the work is done by his [its] own employees and without the intervention of any labor contractor or "middleman".

The Ninth Circuit held, however, that Silver Creek is a third party in a position to exploit both farmers and workers and that it engages in precisely the kind of activity that the FLCRA seeks to regulate. In so holding, the Ninth Circuit relied upon two grounds: (1) that the Court's application of the 3(b)(2) exemption allegedly conforms with the Secretary's regulation 41.17 (a) and (2) the Court's finding is allegedly consistent with the Act's legislative intent, i.e., the regulation of "middlemen" labor contractors. [_____F.2d_____ (9th Cir. 1980)]

As will be shown hereinafter, the Ninth Circuit's holding is neither supported by Congressional intent with respect to the 3(b)(2) exemption, nor by the facts of the instant case.

B. Congressional intent supports Petitioner's position that it performs contracting activities "solely" for its own operations

The 1963 Act incorporated the qualifying words "solely for his own operation" into the 3(b)(2) exemption for the purpose of eliminating a loophole which would exist if a middleman crew leader were able to take advantage of the exemption merely by acquiring a small farm or packing shed, thereby becoming both a farmer as well as a labor contractor.

Thereafter, and prior to the 1974 Amendments to the Act, the Secretary issued an interpretative regulation 41.17(b) in which it construed the phrase "solely for his own operation" to be controlled by the passage of title. Said regulation reads as follows:

> "The Act was intended to regulate the practices of all persons functioning in the capacity of middleman between the farmer, processor, etc., and the migrant worker. Thus, the exclusion applies only in those situations where the normal functions of the middleman are performed by the farmer, processor, etc., solely for himself and should any of these persons perform in the role of middleman, such as **where the activities are in behalf of other employers, producers, processors, etc., in addition to himself, the exclusion would not apply.**
>
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For example, if a processor solicits, recruits, hires, furnishes or transports migrant workers to be used in the harvesting of crops which he has in fact purchased through a contract with the farmer and under whose contractual terms title of the crops is vested in the procesor before the crop has been harvested, the exemption would apply, because the processor would be supplying migrant workers solely for his own operation. Where the processor or any other person acts as the conduit through whom the migrant workers are made available to third parties, even though **the crops** on which the migrant workers are employed **are the subject matter of a contract to purchase (as distinguished from a contract of sale)** and will be used in the processing, canning, etc., **the exemption does not apply."** (29 CFR §41.17; Emphasis added)

The above regulation essentially provided that a packing shed operator or processor did not come within the ambit of the 3(b)(2) exemption if title to the crop was still held by the farmer at the time the harvesting was performed by the packing shed operator's employees, even though the crop harvested by the packing shed operator's employees is substantially packed in his own shed. The apparent rationale of the interpretative regulation was that a packing shed operator or a processor should be considered to be acting in the role of a

middleman rather than his primary role as a packing shed operator or a processor, if he does not hold legal title to the crop at the time he engages in the harvesting operation.

The underlined provisions of this early regulation essentially sought to enlarge the application of the Act far beyond the scope required to eliminate the potential loophole through which the crew leaders might otherwise have attempted to escape the registration requirement of the Act. The eventual effect, had the qualification been applied in the Secretary's manner, would have been to expand the application of the registration (7 U.S.C. Section 2043(a) and 2044) and primary substantive requirements (Testimony of William Johnston R.T. 26:25; 27:1-6) of the Act to bona fide farmers and packing shed operators which Congress never intended to so register or regulate.

Thereafter, during its consideration of the 1974 Amendments, Congress tactfully expressed its disapproval and disagreement with the overreaching aspects of the Secretary's interpretative regulation:

> "The committee wishes to clarify the phrase 'solely for his own operation' as used in Section 3(b)(2) of the Act. The Committee intends that application of this provision shall **not** necessarily depend on where **title** to the commodities involved rests at the time, **but shall in the future depend on a full consideration of the economic realities of agricultural production and processing.**" [Emphasis added] (H.

Rep. 93-1493, 93d Cong., 2d Sess. (1974) at p. 8; S. Rep. 93-1295, 93d Cong., 2d Sess. (1974) at p. 9).

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"Besides those slight changes from our original bill, we have provided report language . . . clarifying the present regulations under the FLCRA regarding passage of title to crops. **Unless the interpretation of the regulations is corrected, processors would have been required to register as contractors if they acquired title to any of the crops handled by them at the time of delivery or at the time of harvest rather than prior to harvest."** [Emphasis added] (Cong. Rec. — House, November 26, 1974, at p. H 11097).

From the above expression of Congressional intent, it is evident that (1) the time at which **title** to the crops passes is **not** to be determinative, and (2) the application of the language "solely" for the packing shed operator's "own operation" for purposes of the exemption shall, instead, "depend upon a full consideration of the economic **realities** of agricultural production and processing."

The "economic realities" of agricultural production and processing dictate that agricultural work sometimes be performed by farmers' employees, packing shed operators, and sometimes by employees of crew leaders. As pointed out, **supra,** there exists a wide variety of practices among growers and packing shed operators. They range at

one extreme from the situation where the grower plants, cultivates, grows, harvests, packs and finally markets all of his own crop, to the other extreme where the grower's operation is limited and restricted, and the packer has extensive control and takes over at harvest time and continues with the transportation, packing, and marketing of the crop. The economic realities of the situation are the factors which bear upon the ultimate decision as to the point at which the farmer's operation is to end and that of the packing shed operators is to begin. These factors are inumerable. They include the consideration of economy in operation, the exigencies of competition, and the quest for profit.

The economic realities of the situation existing between Silver Creek and the growers for which it packs and sells is much more complex than is found by the Court below. Moreover, the Court's reasoning is based upon two fatal errors: (1) its application of **Marshall v. Coastal Growers Association,** 598 F.2d 521 (9th Cir. 1979) to the instant case; and (2) its reliance upon a "direct benefit concept" from which it postulates that growers become dependent upon Silver Creek for its labor contractor services, and thus, such activities cannot be "solely" for Silver Creek's own operation. [_____F.2d at_____ (9th Cir. 1980)]

As will hereinafter be shown, both of the above arguments have no application to Silver Creek. Moreover, the Court's reliance upon the above factors has been rejected by Congress which had directed that the Secretary make a

"**full consideration** of the **economic realities** of Agricultural production and processing", as stated, **supra.** [Emphasis added]

In the lower Court's determination that Silver Creek was not performing labor contracting activities "solely" for its own operations, the Ninth Circuit made an analogy to **Marshall v. Coastal Growers Association, supra,.** In that case, the Court held that non-profit agricultural cooperatives, which hired and paid workers who harvested the crops of grower-members, could not claim the 3(b)(2) exemption because their hiring activities were not for their own operations, but for the operations of their members. [598 F.2d 521, 524-25] In applying **Coastal Growers, supra,** to the instant case, the Ninth Circuit reasoned as follows:

> "Silver Creek, despite its corporate structure, resembles the **Coastal Growers** cooperatives in several significant respects. First, Silver Creek deducts a fixed fee from market proceeds, and returns the balance to the grower. Second, Silver Creek never owns the fruit it handles and assumes no risk of loss unless the market falls below the packing costs. [Citation] Finally, while Silver Creek harvests and markets the produce of nonshareholders, it also processes the produce of growers who exercise control over its operations. The corporation's four shareholders are all melon growers whose crop Silver Creek handles."

The Court's analogy is misplaced for the reason that the **Coastal Growers** case is factually distinguishable from the case at bar.

First of all, Coastal Growers is a **non-profit cooperative** which is composed of member-growers who utilize the cooperative's labor contracting services to harvest the grower-members' crop(s). There is no identity distinction between the cooperative and its grower-members since the grower-members control all aspects of the cooperative's operations. Secondly, the cooperative is set up by the grower-members as a non-profit conduit to perform all of the grower-members' harvesting.

Conversely, Silver Creek is a **single, corporate entity** that engages in harvesting activities at the properties of various growers with whom it contracts, some of whom happen to also be shareholders. Silver Creek's primary and only functions are to harvest, pack and sell melons for its **own** profit, not for its contract growers. It is conceded, however, that its shareholders would receive some indirect profit from the corporation's business activities. Yet, this is the direct result of the nature of any corporate enterprise that is properly managed for a profit. Although both Silver Creek and Coastal Growers are corporate entities, Silver Creek is merely in the business of harvesting for itself as part of a totally integrated operation, not on behalf of grower-members, as is the case in **Coastal Growers, supra.**

Secondly, although Silver Creek deducts a fixed fee from market proceeds and returns the balance to the

grower, Silver Creek assumes the loss of harvest expense if the sale price of the melons is not sufficient to cover the expense of harvesting, packing, selling and shipping of the melons (Testimony of William Johnston R.T. 26:25; 27:1-6).

Third, even though Silver Creek does not own the melons it harvests and assumes no risk of loss unless the market falls below its harvest and packing expenses, ownership of the melons is not dispositive of the application of the 3(b)(2) exemption, (H. Rep. 93-1493, 93d Cong., 2d Sess. (1974 at p.8; S. Rep. 93-1295, 93d Cong. 2d Sess. (1974) at p.9) and further, Silver Creek **does** assume the risk of loss in the event that the melons are damaged or destroyed after it has taken possession of the melons (Testimony of William Johnston, R.T. 18:22-25*). In such an instance, Silver Creek's insurance would reimburse the grower for the lost melons and Silver Creek would assume a complete loss since it would not be able to market the melons.

Lastly, the Court's analogy that Silver Creek is similar to **Coastal Growers** simply because Silver Creek harvests the melons of non-shareholders, as well as the corporation's four shareholders, and therefore, Silver Creek is processing the produce of growers who **exercise control** over its operation, is misplaced. It should be noted that any amount of control which these four shareholders might exert is not the same type as is present in the case of Coastal Growers. In the latter situation, Coastal **is** merely all of its **collective, grower-members** who utilize the cooperative as an alter-ego or service

organization to perform their harvesting activities on a **non-profit** basis.

In the case of Silver Creek, however, it is a **profit** oriented entity that is in the business of harvesting, packing and selling melons solely for its **own** melon packing operation. Silver Creek engages in and manages the **production** and **marketing** of the crops which it contracts out for. This is in extreme contrast to Coastal which merely provides a harvesting service, exclusive of managing or production of the crop, which the Ninth Circuit found dispositive in denying the 3(b)(2) exemption to Coastal. Thus, the Court's analogy to **Coastal Growers, supra,** is totally inapposite and is not relevant to the instant facts.

Next, the Ninth Circuit found that although Silver Creek hires migrant workers for its own operations, said hiring is not "solely" for its own operations. The Court noted that the farmers whose fruit is packed benefit directly from Silver Creek's hiring activities. The Court went on to state that this "direct benefit" concept was evident since the farmers who contract with Silver Creek have a direct stake in the harvesting of their crops. Therefore, since the growers are dependent on Silver Creek's farm labor contracting, those activities cannot be "solely" for the corporation's [Silver Creek's] operations. [_____F.2d at_____]

Although the Court's logical reasoning seems inviting, the Court has totally rejected the dictate of Congress that the Secretary of Labor make the application of 3(b)(2)

exemption to be dependent upon a "full consideration of the economic realities of agricultural production and processing". Moreover, the Court's reasoning shows a one-sided perspective of total dependence by the grower upon Silver Creek's contracting services.

What the Ninth Circuit has overlooked is the fact that the growers have the option to seek outside labor contractors to harvest their melons should Silver Creek decide not to harvest the melons (R.T. 24:23-25; 25:1-9).

What then are the economic realities of Silver Creek's operation? The extent of Silver Creek's operations is indicative of the variety of economic situations which may exist between a grower and a packing shed operator. Silver Creek harvests, hauls, packs, sells, arranges the shipping for and loads all of the melons which it handles. Articles of Incorporation (Exhibit A); Marketing Contract - attachment to Silver Creek's Answer to Department of Labor's (Plaintiff's) Second Set of Interrogatories, T.R. 50-52**.

All of the melons which Silver Creek's employees harvest are packages and sold through Silver Creek's own packing shed (Finding of Fact ¶ 10-12, T.R. 104-105). It does not harvest crops for any growers who then take their crop to a different packing shed operator or processor to be packaged or processed and sold. Silver Creek does not engage in any such middleman activities, but operates solely for its own account as a packer-shipper which provides a total marketing service to those growers who

wish to do business with it, pursuant to its marketing agreement.

In short Silver Creek performs an integrated function for a profit which is complex and all encompassing. Thus, the economic realities of Silver Creek's business, the degree of control it has over the grower's melons and its entire integrated operations clearly established that the agricultural workers employed by Silver Creek are working only on behalf of Silver Creek's operation and that the harvesting functions are done solely for its own business operations.

CONCLUSION

The intent of Congress was to enact remedial legislation to regulate and control the farm labor contractor, the crew pusher or body broker, who was acting as a middleman or bridge between the farmer and the packing shed operator on one hand and the agricultural worker on the other. The intent of Congress was also clear that there should be an exclusion for the farmer or packing shed operator who personally employed agricultural workers, not in his capacity as a middleman, but in carrying out his own operation.

The language "solely for his own operation", was intended by Congress to exclude anyone acting as middleman. The Petitioner, SILVER CREEK PACKING CO., INC., is employing agricultural workers to harvest the fresh melons it packs and sells and is not acting as a middle

man or a bridge between the growers and the agricultural workers; rather it is using its own employees to carry out and further its own operation.

Congress has declared that the interpretation and application of the phrase, "solely for its own operation", shall depend on a **"full** consideration of the economic realities of agricultural production and processing" (Senate Report No. 93-1295; Nov. 21, 1974).

The extensive control which the Petitioner exerts over the crops which it does harvest to the exclusion of any grower control from the time the crop is mature clearly indicates that the agricultural workers employed by the Petitioner are working solely for its operation. Also, the inability of some growers to harvest their crops and the pressures of competition on the Petitioner are among the "economic realities of agricultural production and processing" in the fresh melon industry which compel the grower to limit his operation on the one hand and cause the Petitioner to extend its operation on the other hand.

WHEREFORE, it is respectfully requested that this Honorable Court reverse the findings and conclusion of law of the Ninth Circuit only insofar as they relate to the Courts discussion of the "solely for its own operation" prerequisite of the 3(b)(2) exemption.

Dated: July , 1980

Respectfully submitted,
DRESSLER, STOLL, QUESENBERY
LAWS & BARSAMIAN

By _____
CHARLEY M. STOLL

_____
ROBERT P. ROY

APPENDIX "A"

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Deputy Clerk

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Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

RAY MARSHALL, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

vs.

SILVER CREEK PACKING CO.,
a corporation,
Defendant.

CIVIL ACTION
CIV # F-76-25-CIV
FINDINGS OF FACT AND CONCLUSIONS LAW

The above-entitled matter regularly came on for trial before the Court on August 2, 1977. Daniel W. Teehan,

Regional Solicitor, United States Depart-ment of Labor, by Sandra K. Rodgers, Esq., appeared for plaintiff. Frame & Courtney, by Ted R. Frame, Esq., appeared for defendant. Evidence having been received, arguments of counsel having been made, the matter having been submitted for decision, and the Court being fully advised in the premises, the following Findings of Fact and Conclusions of Law are hereby made by the Court.

FINDINGS OF FACT

The Court makes the following Findings of Fact:

1. Defendant, Silver Creek Packing Co., is a California corporation with its place of business located at Mendota, California.

2. Defendant is a for-profit commercial corporation. Defendant is not an association or a cooperative. It reinvest its earnings in its business, and it has not declared any dividend or dividends to its shareholders.

3. Defendant is engaged (and since July 19, 1975, defendant has been engaged) in the business of harvesting, hauling, packing, selling, and shipping melons.

4. Defendant hires and employs migrant workers in its operation. Defendant does so for a fee in that defendant realizes or hopes to realize a profit in its operation.

5. Defendant personally hires and employs migrant workers solely for its own operation. Defendant is not a middleman.

6. Defendant enters into marketing agreements with melon growers. The marketing agreements give defendant

complete control over the melon crop as soon as it has matured.

7. Defendant does not limit its marketing agreements to its shareholders. It deals with its shareholders and with nonshareholders alike on the same basis.

8. Defendant determines the variety of melon seed to be planted by the grower, defendant furnishes the seed, defendant determines the planting date, and defendant determines the final irrigation date.

9. Defendant takes possession of and complete control over the grower's crop as soon as it has matured. Defendant determines the order in which fields are to be harvested, when the harvest is to begin, how the harvest is to continue on a day-to-day basis after it begins, how many pickers are to be used, the times of day the pickers are to be used, the and related matters. All supervision is by defendant. The grower exercises no control and has no right to control.

10. Upon harvesting the melons, defendant hauls them to its packing shed. All hauling is by defendant. the grower exercises no control and has no right to control. Defendant assumes the risk of loss.

11. Defendant determines the order of packing at its packing shed. The grower exercises no control and has no right to control.

12. Defendant makes all sales decisions: Whether to sell or not to sell, to whom to sell to, for how much, what terms, what method, etc. The grower exercises no control and has no right to control. A single label (defendant's label) is used for all fruit packed.

13. Defendant is a fully integrated operation engaged in personally harvesting, packing, selling and shipping melons solely for its own account.

From the foregoing Findings of Fact the court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

The Court concludes that,

1. Defendant is a primary user of migrant laborers solely for its own operation. Defendant is not a middleman.

2. A corporation can be exempt from registration under Section 3(b)(2) of the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. Section 2041, et seq., as ammended by P.L. 93-518, 88 Stat. 1652 (December 7, 1974, if the corporation personally engages in contracting activities solely in its own behalf as such; and defendant does so:

3 (b) (2) of the Act.

4. Plaintiff is not entitled to relief sought by him.

5. Defendant is entitled to judgment that plaintiff take nothing by his complaint and that defendant recover its costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 19th, 1977

M.D. Crocker
United States District Judge

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APPENDIX "B"

FILED
MAR 25 1980
RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-1200
OPINION

RAY MARSHALL, SECRETARY OF LABOR
U.S. DEPARTMENT OF,

Appellant,

vs.

SILVER CREEK PACKING CO.,
a corporation,
Appellee.

Appeal from the United States District Court
For the Eastern District of California
M.D. Crocker, District Judge, Presiding
Argued and submitted January 7, 1980

Before: GOODWIN and SCHROEDER, Circuit Judges
and EAST*, District Judge

PER CURIAM

The Secretary of Labor appeals the denial of a petition for an order restraining Silver Creek Packing Co. from

violating the Farm Labor Contractor Registration Act (FLCRA or "the Act"), 7 U.S.C. §2041, et seq. The district court found that Silver Creek was exempt from the FLCRA's registration and disclosure provisions and entered judgment for the company. We reverse.

Silver Creek picks and packs cantaloupes for a profit. For a "packing expense," which reflects the company's costs and includes a fixed profit margin, the company harvests, processes, and markets the melon crops of individual growers.[1] Silver Creed does not directly assess farmers for the "packing expense," but deducts its fees from the proceeds realized from marketing the produce, returning the balance to the grower. Because Silver Creek takes its fee "off the top," the individual grower bears the loss if the market price is less than the sum of his overhead growing costs plus the corporation's "packing expense." The company takes a loss only if the market price does not cover its "packing expense."[2]

To obtain workers for its harvesting operations, Silver Creek recruits and hires migrant laborers. the Secretary alleges that, because of its hiring activities, Silver Creek is a "farm labor contractor," subject to the registration and disclosure reguirements of the Farm Labor Contractor Registration Act. [3] Silver Creek responds, and the district court held, that the company falls within an exemption from the FLCRA's coverage as a "packing shed operator * * * who personally engages in [hiring activities] for the purpose of supplying migrant workers solely for [its] own operation."[7] U.S.C. §2042 (b) (2).

In this appeal, the Secretary contends that Silver Creek neither "personally engages" in labor contracting nor hires migrant workers "solely" for its operations. Both conditions are necessary for exemption under §2042 (b) (2); neither alone is sufficient. Accordingly, if either of the Secretary's contentions is valid, Silver Creek is not exempt.

We reject the Secretary's argument that Silver Creed does not "personally" engage in labor contracting. the arguments presented on this issue are indistinguishable from those raised by the parties in **Marshall v. Green Goddess Avocado Corp.,** ____F. 2d____ (9th Cir. 1980), decided this day. For the reasons guiding our holding in that case, we find that Silver Creek, as a corporation, can, and does, "personally" hire farm laborers.

Silver Creek does not, however satisfy the second condition of the (b) (2) exemption. Its labor contracting activities are not "solely" for its own operations.

In **Marshall v. Coastal Growers Ass'n,** 598 F. 2d 521 (9th Cir. 1979), this court held that nonprofit agricultural cooperatives, which hired and paid workers who harvested the crops of grower-members, could not claim (b) (2) exemptions because their hiring activities were not for their own operations, but for the operations of their member. Id. at 524-25.

Silver Creek, despite its corporate structure resembles the **Coastal Growers** cooperatives in several significant respects. First, Silver Creek deducts a fixed fee from market proceeds, and returns the balance to the grower.

Second, Silver Creek never owns the fruit it handles and assumes no risk of loss unless the market falls below the packing costs.[4] Finally, while Silver Creek harvests and markets the produce of nonshareholders, it also processes the produce of growers who exercise control over its operations. the corporation's four shareholders are all melon growers whose crops Silver Creek handles.

Silver Creek contends that it differs from the **Coastal Growers** cooperatives because it realizes a profit. But the profit distinction is immaterial. For while Silver Creek hires migrant workers for its own operations and benefits from their efforts, that hiring is not "solely" for its operations. The farmers whose fruit is picked benefit directly from Silver Creek's hiring activities.

This "direct benefit" concept may be understood by reference to the facts in **Marshall v. Green Goddess Avocado Corp., supra.** The corporation in **Green Goddess** pays farmers for fruit while the fruit is on the tree. Green Goddess harvests the fruit, markets it, and retains all of the market proceeds. Growers, after selling their crops to Green Goddess, are indifferent about whether the crops are harvested. If the fruit rots, that is Green Goddess's loss; the grower has been paid. Consequently, when Green Goddess hires migrant workers, it is solely for its own operations. It alone has an interest in their efforts.

The farmers who contract with Silver Creek, however, have a direct stake in the harvesting of their crops. After the corporation deducts its "packing expense" from market proceeds, the growers receive the remainder. If

their melons are not picked, the growers receive nothing. Because the growers are dependent on Silver Creek's farm labor contracting, those activities cannot be "solely" for the corporation's operations.

Our application of the (b) (2) exemption conforms with the Secretary's regulations interpreting the FLCRA.[5] Furthermore, it is consistent with the Act's legislative intent, the regulation of "middlemen" labor contractors.[6] Silver Creek, for a fee, provides workers to harvest individual growers' crops.[7] It is a third party in a position to exploit both farmers an workers. It engages in precisely the kind of activity that the FLCRA seeks to regulate.

The district court's finding of exemption under §2042 (b) (2) falls before **Marshall v. Coastal Growers Ass'n, supra.**

Reversed.

FOOTNOTES

1. The amount of Silver Creek's profit margin is not specified in the record.

2. The effect of this arrangement, unlike that in **Marshall v. Green Goddess Avocado Corp.**, ____F. 2d____ (9th Cir. 1980), where the grower's profit is fixed and the corporation's profit or loss depends on market conditions, is that Silver Creek's profit is virtually guaranteed, and the farmers' income varies with market fluctuations.

3. 7 U.S.C. §2042 (a) and (b), defining "farm labor contractor," read in relevant part as follows:

"As used in this chapter - -

"(a) The term 'person' includes any individual, partnership, association, joint stock company, trust, or corporation.

"(b) the term 'farm labor contractor' means any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment. Such term shall not include - -

(1) any nonprofit charitable organization, public or nonprofit educational institution, or similar organization;

(2) any farmer, processor, canner, ginner, packing shed operator, or nurseryman who personally engages in any such activity for the purpose of supplying

migrant workers solely for his own operation;

(3) any full-time or regular employe of any entity referred to in (1) or (2) above who engages in any such activity solely for his employer on no more than an incidental basis."

Under 7 U.S.C. §2043 (a), a "farm labor contractor" must obtain a certificate of registration from the Secretary of Labor. 7 U.S.C. § 2045 - "Obligations and prohibitions" - requires, among other things, that a "farm labor contractor" disclose various conditions of employment to laborers at the time they are recruited and refrain from recruiting or hiring illegal aliens.

4. Testimony at trial established that if a truckload of melons should be destroyed between a grower's field and Silver Creek's packing shed, Silver Creek's insurance carrier would reimburse the grower, at least to the extent of the grower's fixed production costs.

5. 29 C.F.R. § 41.17 reads in relevant part as follows:

"(a) * * * The Act was intended to regulate the practices of all persons functioning in the capacity of middlemen between the farmer, processor, ets., and the migrant worker. Thus, the exclusion applies only in those situations where the normal functions of the middlemen are performed by the farmer, processor, etc., solely for himself and should any of these persons perform in the role of middleman, such as

where the activities are in behalf of other employers, producers, processors, etc., in addition to himself, the exclusion would not apply. * * *.

"(b) For example, if a processor solicits, recruits, hires, furnishes or transports migrant workers to be used in the harvesting of crops which he has in fact purchased through a contract with the farmer and under whose contractual terms title to the crops is vested in the processor before the crop has been harvested, the exemption would apply, because the processor would be supplying migrant workers solely for his own operation. Where the processor or any other person acts as the conduit through whom the migrant workers are made available to thrid parties, even though the crops on which the migrant workers are employed are the subject matter of a contract to purchase (as distinguished from a contract of sale) and will be used in the processing, canning, etc., the exemption does not apply."

6. **See Marshall v. Green Goddess Avocado Corp.,** F. 2d n. 11 (9th Cir. 1980).

7. Silver Creek does not directly assess farmers for the "packing expense," but deducts that cost from market proceeds, so it assumes the minimal risk that the market will not cover its fee. However, because the "packing expense" is taken "off the top," Silver Creek's risk of loss is negligible compared to that of the growers.

APPENDIX "C"

CHAPTER 52.—FARM LABOR CONTRACTOR REGISTRATION

Section

2050a. Civil relief
2050b. Discrimination prohibited.
2050c. Recordkeeping.
2054 Waiver of rights.
2055 Authorization of appropriations.

2041. Congressional findings and declaration of policy.

Amendment.—Act Dec. 7, 1974, P. L. 93-518, § 11(d), 88 Stat. 1656, amended subsection (b) of this section by striking the word "interstate" the second time it appears.

Short title.—Act Dec. 7, 1974, P. L. 93-518, § 1, 88 Stat. 1652, provided that "(a) this Act [7 USCS § § 2041 note, 2042-2046, 2048, 2050a-2055] may be cited as the "Farm Labor Contractor Registration Act Amendments of 1974".

"(b) Unless the context otherwise requires, when ever in this Act [7 USCS § § 2041 note, 2042-2046, 2048, 2050a-2055] an amendment is expressed in terms of an amendment to a section or other provision the reference shall be considered to be made to a section or other provision of the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 et seq.)."

2042. Definitions.— As used in this Act [7 USCS § § 2041 et seq.]—

(a) * * *

(b) The term "farm labor contractor" means any person, who for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment. **Such term shall not include—**

(1) any nonprofit charitable organization, public or nonprofit private educational institution, or similar organization;

(2) any farmer, processor, canner, ginner, **packing shed operator, or nurseryman who personally engages in any such activity for the purpose of supplying migrant workers solely for his own operation;**

(3) **any full-time or regular employee** of any entity referred to in (1) or (2) above **who engages in such activity solely for his employer** on no more than an incidental basis;

(4) any person who engages in any such activity (A) solely within a twenty-five mile intrastate radius of his permanent place of residence and (B) for not more than thirteen weeks per year;

(5) any person who engages in any such activity for the purpose of obtaining migrant workers of any foreign nation for employment in the United States if the employment is subject to—

(A) an agreement between the United States and such foreign nation; or

(B) an arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for and the enforcement thereof is provided for through the United States by an instrumentality of such foreign nation;

(6) any full-time or regular employee of any person holding a certificate of registration under this Act [7 USCS § § 2041 et seq.]; or

(7) any common carrier or any full-time regular employee thereof engaged solely in the transportation of migrant workers.

(c) * * *

(d) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f), or Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121 (g) and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

(g) * * * (as amended Dec. 7 1974, P. L. 93-518, § § 2, 3, 88 Stat. 1652, 1653.)

2043 Certificate of registration required

(a) * * *

(c) No person shall engage the services of any farm labor contractor to supply farm laborers unless he first determines

that the farm labor contractor possesses a certificate from the Secretary that is in full force and effect at the time he contracts with the farm labor contractor.

(d) Upon determination by the Secretary that any person knowingly has engaged the services of any farm labor contractor who does not possess such certificate as required by subsection (c) of this section, the Secretary is authorized to deny such person the facilities and services authorized by the Act of June 6, 1933 (48 Stat. 113; 29 U.S.C. 49 et. seq.), commonly referred to as the Wagner-Peyser Act, for a period of up to three years (As amended Dec. 7, 1974, P.L. 93-518, #4, 88 Stat. 1653.)

2044, Issuance of certificate of registration. —

(a) * * *

(1) * * *

(2) has filed, within such time as the Secretary may prescribe, proof satisfactory to the Secretary of the financial responsibility of the applicant or proof satisfactory to the Secretary of existence of a policy of insurance which insures such applicant against liability for damages to persons or property arising out of the applicant's ownership of, operations of, or his causing to be operated any vehicle for the transportation of migrant workers in connection with his business, activities, or operations as a farm labor contractor. In no event shall the amount of such insurance be less than the amount currently applicable to vehicles used in the transportation of passengers in interstate comerce under the Interstate Commerce Act [49 USCS § § 1 et seq.] and regulations promulgated

pursuant thereto, or amounts offering comparable protection to persons or property from damages arising out of the applicant's ownership of, operations of, or his causing to be operated any vehicle as provided herewith: **Provided,** That the Secretary shall have the discretion to issue regulations requiring insurance in the highest amounts feasible which are less than the amount currently applicable to vehicles used in the transportation of passengers in interstate commerce under the Interstate Commerce Act [49 USCS § § 1 et seq.] and regulations promulgated pursuant thereto, if the Secretary, after due and careful consideration, determines that the insurance coverage in such amounts is not available to farm labor contractors in the same manner and in the same amounts as such coverage is available to other carriers used to transport passengers in interstate commerce;

(3) has filed, within such time as the Secretary may prescribe, a set of his fingerprints;

(4) has filed, under such terms as the Secretary may prescribe, a statement identifying each vehicle to be used by the applicant for the transportation of migrant workers, and all real property to be used by the applicant for the housing of migrant workers, during the period for which registration is sought along with proof that every such vehicle and all such housing currently conform to all applicable Federal and State safety and health standards to the extent that such vehicle and all such housing are under the applicant's ownership or control; and

(5) has consented to designation of the Secretary as the

agent available to accept service of summons in any action against such farm labor contractor at any and all times during which such farm labor contractor has departed from the jurisdiction which such action is commenced or otherwise has become unavailable to accept service, under such terms and conditions as are set by the court in which such action has been commenced.

(b) * * *

(1) * * *

(6) has recruited, employed, or utilized, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment;

(7) has been convicted of any crime under State or Federal law relating to gambling or to the sale, distribution, or possession of alcoholic liquors in connection with or incident to his activities as a farm labor contractor; or has been convicted of any crime under State or Federal law involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, or peonage; where the date of the judgment of conviction of any crime as specified herein has been entered within a period of five years preceding the action of the Secretary under this subsection;

(8) * * *

(9) knowingly employs, or continues to employ any person to whom subsection (b) of section 4 of this Act [§

2042(b) of this title] applies who has taken any action, except for that listed in paragraph (5) of this subsection, which could be used by the Secretary under this subsection to refuse to issue a certificate of registration;

(10) has failed to comply with any of the provisions of this Act [§ § 2041 and notes—2053 of this title] or any regulations issued hereunder;

(11) is not in fact the real party in interest in any such application or certificate of registration and that the real party in interest is a person, firm, partnership, association, or corporation who previously has been denied a certificate of registration, has had a certificate of registration suspended or revoked, or who does not presently qualify for a certificate or registration; or

(12) has used a vehicle for the transportation of migrant workers, or has used real property for the housing of migrant workers, while such vehicle or real property failed to conform to all applicable Federal and State safety and health standards, to the extent any such vehicle or real property has come within the ownership or control of such farm labor contractor.

(c) * * *

(d) Person issued a certificate of registration under this section shall provide the Secretary a notice of each and every address change within ten days after such change. the Secretary shall maintain a public central registry of all persons issued certificates of registration under this section. Persons issued a certificate of registration under this section shall provide to the Secretary documentation

required under section 5 (a)(4) of the Act [7 USCS § 2044 (a)(4)] applicable to any vehicle which the applicant obtains for use in the transportation of migrant workers and any real property which the applicant obtains or learns will be used for the housing of migrant workers during the period for which the certificate of registration is issued, within ten days after he obtains or learns of the intended use of such vehicle or real property, to the extent that such vehicle or such real property is under the ownership of control of such persons who have been issued certificates of registration. (As amended Dec. 7, 1974, P.L. 93-518, § § 5-8, 88 Stat. 1653-1655.)

2045 Obligations and prohibitions. — Every farm labor contractor shall—

(a) carry his certificate of registration with him at all times while engaging in activities as a farm labor contractor and exhibit the same to all persons with whom he intends to deal in his capacity as a farm labor contractor prior to so dealing and shall be denied the facilities and services authorized by the Act of June 6, 1933 (29 U.S.C. 49 et seq.), upon refusal or failure to exhibit the same;

(b) ascertain and disclose to each worker at the time the worker is recruited the following information to the best of his knowledge and belief; (1) the area of employment, (2) the crops and operations on which he may be employed, (3) the transportation, housing, and insurance to be provided him, (4) the wage rates to be paid him, (5) the charges to be made by the contractor for his services [,] (6)

the period of employment, (7) the existence of a strike or other concerted stoppage, slowdown, or interruption of operations by employees at a place of contracted employment, and (8) the existence of any arrangements with any owner, proprietor, or agent of any commercial or retail establishment in the area of employment under which he is to receive a commission or any other benefit resulting from any sales provided to such commercial or retail establishment from the migrant workers whom he recruits. The disclosure required under this subsection shall be in writing in a language in which the worker is fluent, and written in a manner understandable by such workers on such forms and under such terms and conditions as the Secretary shall prescribe.

(c) upon arrival at a given place of employment, post in a conspicuous place a written statement of the terms and conditions of that employment;

(d) in the event he manages, supervises, or otherwise controls the housing facilities, post in a conspicuous place the terms and conditions of occupancy;

(e) in the event he pays migrant workers engaged in agricultural employment, either on his own behalf or on behalf of another person, keep payroll records which shall show for each worker total earnings in each payroll period, all withholdings from wages, and net earnings. In addition, for workers employed on a time basis, the number of units of time employed and the rate per unit of time shall be recorded on the payroll records, and for workers employed on a piece rate basis, the number of units of work

performed and the rate per unit shall be recorded on such records. In addition he shall provide to each migrant worker engaged in agricultural employment with whom he deals in a capacity as a farm labor contractor a statement of all sums paid to him (including sums received on behalf of such migrant worker) on account of the labor of such migrant worker. He shall also provide each such worker with an itemized statement showing all sums withheld by him from the amount he received on account of the labor of such worker, and the purpose for which withheld. He shall additionally provide to the person to whom any migrant worker is furnished all information and records required to be kept by such contractor under this subsection, and all information required to be provided to any migrant worker under this subsection. The Secretary may prescribe appropriate forms for the recording of information required by this subsection;

(f) refrain from recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted for permanents residence or who has not been authorized by the Attorney General to accept employment;

(g) promptly pay or contribute when due to the individuals entitled thereto all moneys or other things of value entrusted to the farm labor contractor by any farm operator for such purposes; and

(h) refrain from requiring any worker to purchase any goods solely from such farm labor contractor or any other person. (Sept. 7, 1964, P.L. 88-582, § 6, 78 Stat. 922; Dec.

7, 1974, P.L. 93-518, § § 9-11, 88 Stat. 1655, 1656.)

2046 Authority to obtain information — The Secretary or his designated representative may investigate and gather data with respect to matters which may aid in carrying out the provisions of this Act [§ §2041 and notes — 2053 of this title]. In any case in which a complaint has been filed with the Secretary regarding a violation of this Act [§ §2041 and notes — 2053 of this title] or with respect to which the Secretary has reasonable grounds to believe that a farm labor contractor has violated any provisions of this Act [§ §2041 and notes — 2053 of this title], the Secretary or his designated representative may investigate and gather data respecting such case, and may, in connection therewith, enter and inspect such places and such records (and make such transcriptions thereof), question such persons, and investigate such facts, conditions, practices, or matters as may be necessary or appropriate to determine whether a violation of this Act [§ §2041 and notes — 2053 of this title] has been committed. The Secretary may issue subpenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations. The Secretary may administer oaths and affirmations, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this chapter [7 USCS § §2041 et seq.], the provisions of sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914 (15 U.S.C. 49, 50) (relating to the attendance of witnesses and the production of books, papers, and

documents), are made applicable to the jurisdiction, powers and duties of the Secretary. The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other party who provides information to the Secretary with respect to which the Secretary commences an investigation. The Secretary shall monitor and investigate activities of farm labor contractors in such manner as is necessary to enforce the provisions of this Act. [7 USCS § § 2041 et seq.] (Sept. 7, 1964, P.L. 88-582, § 7, 78 Stat. 923; Dec, 7, 1974, P.L. 93-518, § 12, 88 Stat. 1656.)

2048 Penalty provisions. — (a) Any farm labor contractor or employee thereof who willfully and knowingly violates any provision of this Act [§ § 2041 et seq.] shall be fined not more than $500, sentenced to a prison term not to exceed one year, or both, and upon conviction for any subsequent violation, shall be punishable by a fine not to exceed $10,000 or sentenced to a prison term not to exceed three years, or both. The Secretary shall report on enforcement of the provisions of this Act [7 USCS § § 2041 et seq.] in the annual report of the Secretary required pursuant to section 9 of the Act entitled 'An Act to create a Department of Labor', approved March 4, 1913 (37 Stat. 738, 29 U.S.C. 560). The reporting hereunder shall include, but shall not be limited to, a description of efforts to monitor and investigate the activities of farm labor contractors, the number of persons to whom certifi-

cates of registration have been issued, the number of complaints of violation received by the Secretary and their disposition, and the number and nature of any sanctions imposed.

(b)(1) Any person who commits a violation of this Act [7 USCS § §2041 et seq.] or any regulations promulgated under this Act [7 USCS § §2041 et seq.] may be assessed a civil money penalty of not more than $1,000 for each violation. The penalty shall be assessed by the Secretary upon written notice, under the procedures set forth herein.

(2) Ther person assessed shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of assessement. In such hearing, all issues shall be determined on the record pursuant to section 554, of title 5, United States Code [5 USCS §554]. The agency determination shall be made by final order subject to review only as provided in paragraph (3). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(3) Any person against whom an order imposing a civil money penalty has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary.

The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code [5 USCS § 706 (2)(E)].

(4) If any person fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(5) All penalties collected under authority of this section shall be paid into the Treasury of the United States.

(c) Notwithstanding subsections (a) and (b) of this section, any farm labor contractor who commits a violation of subsection 6(f) of the Act [7 USCS § 2045 (f)] or any regulations promulgated thereunder shall upon conviction be fined not to exceed $10,000 or sentenced to a prison term not to exceed three years, or both, if the person committing such violation has failed to obtain a certificate of registration pursuant to this Act [7 USCS § § 2041 et seq.] or is one whose certificate has been suspended or revoked by the Secretary. (Sept. 7, 1964, P.L. 88-582 § 9, 78 Stat. 924; Dec. 7, 1974, P.L. 93-518, § 13, 88 Stat. 1656.)

2050a. Civil relief — (a) Any person claiming to be aggrieved by the violation of any provision of this Act [7 USCS §§2041 et seq.] or any regulation prescribed hereunder may file suit in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties and without regart to exhaustion of any alternative administrative remedies provided herein.

(b) Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action. If the court finds that the respondent has intentionally violated any provision of this Act [7 USCS §§2041 et seq.] or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief. Any civil action brought under this section shall be subject to appeal as provided in chapter 83 of title 28, United States Code [28 USCS §§ 1291 et seq.].

(c) If upon investigation the Secretary determines that the provisions of this Act [7 USCS §§2041 et seq.] have been violated, he may petition any appropriate district court of the United States for temporary or permanent injunctive relief.

(d) Except as provided in section 518(a) of title 28, United States Code [28 USCS § 518(a)], relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil

litigation brought under this Act [7 USCS § § 2041 et seq.] but all such litigation shall be subject to the direction and control of the Attorney General (Sept. 7, 1964, P.L. 88-582 § 12, as added Dec. 7, 1974, P.L. 93-518, § 14(a), 88 Stat. 1658.)

2050b. Discrimination prohibited — (a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant worker because such worker has, with just cause, filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act [7 USCS § § 2041 et seq.] or has testified or is about to testify in any such proceedings or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this Act [7 USCS § § 2041 et seq.].

(b) Any worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, within one hundred eighty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this section have been violated, he shall bring an action in an appropriate United States district court against such person. In any such action, the United States district courts shall have jurisdiction, for cause shown, to restrain violation of subsection (a) and order all appropriate relief including rehiring or reinstatement of the worker, with

back pay, or damages. (Sept. 7, 1964, P.L. 88-582, § 13, as added Dec. 7, 1974, P.L. 93-518, § 14(a), 88 Stat. 1658.)

2051. State laws and regulations.

(Sept. 7, 1968, P.L. 88-582, § 15 [12], 78 Stat. 924; Dec. 7, 1974, P.L. 93-518, § 14(a), 88 Stat. 1657.)

Redesignation. — This section formerly §12 of the Farm Labor Contractor registration Act of 1963, was redesignated by Act Dec. 7, 1974, to be §15 of the Farm Labor Contractor Registration Act of 1963.

2052 Severability.

(Sept. 7, 1964, P.L. 88-582, § 16 [13], 78 Stat. 924; Dec. 7, 1974, P.L. 93-518, § 14(a), 88 Stat. 1657.)

Redesignation — This section formerly §13 of the Farm Labor Contractor Registration Act of 1963, was redesignated by Act Dec. 7, 1974, to be §16 of the Farm Labor Contractor Registration Act of 1963.

2053. Rules and regulations.

(Sept. 7, 1964, P.L. 88-582, § 17 [14], 78 Stat. 924; Dec. 7, 1974, P.L. 93-518, § § 14 (a), 17, 88 Stat. 1657, 1659.)

Amendment — Act Dec. 7, 1974, P.L. 93-518, § 16, 88 Stat. 1659, amended this section by striking the words "of section 4, 5, 6, and 8".

Redesignation — This section formerly §14 of the Farm Labor Contractor Registration Act of 1963, was redesignated by Act Dec. 7, 1974, to be §17 of the Farm Labor Contractor Registration Act of 1963.

2054 Waiver of rights. — Any agreement by an employee purporting to waive or to modify his rights hereunder shall be void as contrary to public policy,

except a waiver or modification of rights or obligations hereunder in faor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act [7 USCS § §2041 et seq.]. (Sept. 7, 1964, P.L. 88-582, §18, as added Dec. 7, 1974, P.L. 93-518, §15, 88 Stat. 1658.)

2055 Authorization of appropriations. — There are authorized to be appropriated to carry out the purposes of this Act [7 USCS § §2041 et seq.] such sums as may be necessary for the effective enforcement of this Act [7 USCS § §2041 et seq.]. (Sept. 7, 1964, P.L. 88-582, §19, as added Dec. 7, 1974, P.L. 93-518, §15, 88 Stat. 1659.)

Cross reference — Immunity of witnesses, see § § 6001-6005 of Title 18.

2119. Market development, research or sales promotion programs. — The Commodity Credit Corporation, in furtherance of its powers and duties under subsections (e) and (f) of section 5 of the Commodity Credity Corporation Charter Act [15 USCS §714c(e) and (f)], shall through the Cotton Board established under the Cotton research and Promotion Act [7 USCS § §2101-2118], and upon approval of the Secretary, enter into agreements with the contracting organization specified pursuant to section 7(g) of that Act [7 USCS § 2106(g)] for the conduct in domestic and foreign markets, of market development, research or sales promotion programs and programs to aid in the development of new and additional markets, marketing facilities and uses for cotton and cotton products, including programs to facilitate the utilization and commercial application of research findings.

Each year the amount available for such agreements shall be 10 million dollars. The Secretary is authorized to deduct from funds available for payments to producers under section 103 of the Agricultural Act of 1949, as amended [7 USCS §1444], on each of the 1972 through 1977 crops of upland cotton such additional sums for use as specified above (not exceeding $10,000,000 for each such crop) as he determines desirable; and the final rate of payment provided in section 103 if higher than the rate of the preliminary payment provided in such section shall be reduced to the extent necessary to defray such costs. No funds made available under this sections shall be used for the purpose of influencing legislative action or general farm policy with respect to cotton. (Nov. 30, 1970, P.L. 91-524, Title VI, §610, 84 Stat. 1378; Aug. 10, 1973, P.L. 93-86, § 1(23), 87 Stat. 235.)

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss.
County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On August 14, 1980, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of 6 sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct. EXECUTED on August 14, 1980, at Santa Ana, California.

JACK GALLAGHER

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-201

In the Supreme Court of the United States

OCTOBER TERM, 1980

SILVER CREEK PACKING CO., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's farm labor contracting activity is not "solely for [its] own operation" and is thus not exempt from the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2041 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-39) is reported at 615 F. 2d 848. The opinion of the district court (Pet. App. 28-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1980. On June 12, 1980, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to August 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1976, the Secretary of Labor instituted the present action in the United States District Court for the Eastern District of California to enjoin petitioner from engaging in farm labor contracting activities without first obtaining a certificate of registration from the Secretary pursuant to the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2041 *et seq.* The district court concluded (Pet. App. 31) that petitioner's contracting activities are undertaken "solely in its own behalf" and that it is therefore exempt from the requirements of the Act under 7 U.S.C. 2042(b)(2), which excludes "any * * * packing shed operator * * * who personally engages in [farm labor contracting activity] for the purpose of supplying migrant workers solely for his own operation." The court of appeals reversed, holding (Pet. App. 36) that "[b]ecause the growers are dependent on [petitioner's] farm labor contracting, those activities cannot be 'solely' for" petitioner's own operation.

The material facts are not in dispute. Petitioner picks and packs cantaloupes grown by individual farmers (Pet. App. 33). The growers prepare the land and plant, thin,

fertilize and irrigate the melon crop (Tr. 31-32).[1] Pursuant to its marketing agreements with melon growers, petitioner controls the harvesting, hauling, packing, shipping, and sale of the growers' crops (Pet. App. 30). In order to harvest the growers' crops, petitioner recruits and employs migrant workers (*id.* at 33). Those workers are housed in a labor camp owned and operated by petitioner and are transported to the growers' fields in buses owned by petitioner (R. 16).[2]

Petitioner reaps a profit in the form of a "packing expense," which includes all of its costs plus a set profit margin (Pet. App. 33). This packing expense is deducted "off the top" from the proceeds obtained when the melons are sold; the balance of the proceeds is then passed on to the growers (*ibid.*). All costs of harvesting, hauling, packing, and selling the growers' melon crops (as well as charges levied by the State of California for melon research and disease control) are ultimately borne by the growers when petitioner makes its packing expense deduction (R. 71, 23).

ARGUMENT

The court of appeals correctly rejected petitioner's claim of exemption. There is no conflict among the circuits on this issue, and further review by this Court is unwarranted.

A packing shed operator that employs migrant workers is a farm labor contractor under the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2042(b). However, such an operator is exempt from the Act's requirements if it engages in its farm labor contracting activity "solely for [its] own operation." 7 U.S.C.

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[1] "Tr." refers to the August 2, 1977 proceedings in the district court.

[2] "R." refers to the record in the court of appeals.

2042(b)(2). The only question is whether petitioner's hiring and harvesting activities are conducted solely for its own operation.

Petitioner does not deny that the growers whose crops it harvests have a direct stake in its activities. It does not deny that its own profit is realized first, and that the sale price of the crop must exceed its "packing expense" in order for the grower even to recover his costs. In light of these undisputed facts, the court of appeals' conclusions that the grower is directly dependent on petitioner's activities and that those activities thus are not "solely" for petitioner's own benefit are unassailable.

Petitioner correctly states (Pet. 18-25) that Congress has decreed that the "economic realities" of a situation must govern the question of exemption under the Act. Where title rests at a given time thus is not determinative, as Congress noted in amending the Act in 1974. H.R. Rep. No. 93-1493, 93d Cong., 2d Sess. 8 (1974); S. Rep. No. 93-1295, 93d Cong., 2d Sess. 7 (1974). However, Congress has never suggested that the question of title is irrelevant. And, in a situation like this, a significant economic reality is that title to the crops remains in the grower and never passes to the packing shed operator. Thus, the grower has a vested interest in the operator's activities, which are undertaken both in the operator's own interest *and* in the interest of the grower. As the court of appeals pointed out (Pet. App. 35-36), "[i]f their melons are not picked, the growers receive nothing."[3]

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[3]Contrary to the suggestion of amicus Nisei Farmers League (Br. 15), the court of appeals nowhere held that "the title to the crop at the time of harvest is determinative * * *."

The court of appeals noted (Pet. App. 35) that the situation in the instant case differs significantly from that in *Marshall* v. *Green Goddess Avocado Corp.*, 615 F. 2d 851 (9th Cir. 1980). There, growers sold their crops to Green Goddess, the farm labor contractor, while they were still on the trees. Thus, it did not matter to the growers whether the fruit was picked; they had been paid. If the crop spoiled, Green Goddess—which harvested, marketed and sold the fruit—took the total loss. Therefore, as the court stated, Green Goddess' contracting activities were solely for its own operation. It alone had an interest in the work performed by the hired workers.

Petitioner argues (Pet. 23-25) that, because it has complete control over the disposition of the crops, and because it has an "entire integrated operation," the economic reality is that it acts solely for its own benefit. However, even if the growers have no control whatsoever over petitioner's activity, they nevertheless remain vitally interested in that activity until the final profits are realized. The court of appeals correctly noted (Pet. App. 39 n.7) that, because petitioner's profit is taken "off the top," its risk of loss is "negligible compared to that of the growers." In such circumstances, it cannot be maintained that petitioner's activity is solely for its own benefit.[4]

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[4]Petitioner maintains (Pet. 21) that the fact that it is a profit-making corporation is somehow relevant to the exemption question. It is true that in that respect petitioner differs from the nonprofit corporation whose status was at issue in *Marshall* v. *Coastal Growers Ass'n*, 598 F. 2d 521 (9th Cir. 1979). But it was this very nonprofit character that was the basis for Coastal Growers' claim that it was not an entity separate from the farmers, but instead their alter-ego. The court rejected the claim for exemption, holding (*id.* at 524-525) that, in spite of its nonprofit character, Coastal Growers *was* an entity separate from the individual growers and that it conducted its activities on their behalf as well as its own. Here, petitioner's profit-making character and the fact that it serves both shareholder-growers

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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and non-shareholders alike make it even more distinct an entity than was Coastal Growers. Both shareholders and non-shareholders are entirely dependent on petitioner's activities.

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Supreme Court, U. S.
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No. 80-201

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OF THE

United States

OCTOBER TERM, 1980

SILVER CREEK PACKING CO., a corporation,
Petitioner,

VS.

RAY MARSHALL, Secretary of Labor,
U. S. Department of Labor,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NISEI FARMERS LEAGUE AS AMICUS CURIAE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NISEI FARMERS LEAGUE AS AMICUS CURIAE

By motion for leave of this Court, filed simultaneously herewith, Nisei Farmers League, a California non-profit corporation, (hereinafter "Nisei Farmers League" or "NFL League") files this brief as amicus curiae.

I

INTERESTS OF THE AMICUS CURIAE

Silver Creek Packing Co. (hereinafter Silver Creek) is a for-profit corporate melon "packing shed operator" that employs agricultural (i.e., migrant) workers to harvest the melon crops of shareholder and non-shareholder farmers

with whom it has contracted to harvest, pack and sell. Silver Creek only harvests those melon crops that it has contracted to pack and sell. It exerts substantial control over the planting and care of those crops which it has contracted to pack and sell, and it completely controls the harvesting process itself. After harvest, Silver Creek's own agricultural employees haul the melons in Silver Creek's own vehicles to its packing shed where the melons are packed, sold, and shipped. Silver Creek supervises and controls the entire harvest, haul, packing, selling, and shipping operation. The farmer-clients exercise no control and have no right to control any of these operations.

On September 19, 1977, U. S. District Court Judge M. D. Crocker ruled that Silver Creek's hiring of harvest workers (who pick the melons grown by farmers who have contracted with Silver Creek to sell and market said melons) is "solely for [Silver Creek's] own operation" so that Silver Creek is entitled to the Section 3(b)(2) exemption from registration under the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), 7 U.S.C. § 2041, at § 2042(b)(2).

On March 25, 1980, the Ninth Circuit Court of Appeals reversed the District Court thereby requiring Silver Creek to register. The Ninth Circuit held that Silver Creek's utilization of its harvest workers upon the melon fields of its farmer-clients was not "solely for [Silver Creek's] own operation" so that it was not entitled to the Section 3(b)(2) exemption from registration. The Ninth Circuit held that while Silver Creek hires its own migrant workers for its own harvesting operations and benefits from the

harvest workers efforts, that said hiring is not "solely" for Silver Creek's operations because the farmers whose melons are picked also benefit from Silver Creek's hiring activities. The Ninth Circuit Court of Appeals supported its dual "benefit" test by stating said benefit test conformed with the Secretary of Labor's Regulation at 29 C.F.R. § 41.17 (hereinafter Regulation 41.17) interpreting Section 3(b)(2) of the FLCRA.[1] The Ninth Circuit Court of Appeals interpreted Regulation 41.17 to provide that title to the crop at the time of its harvest is determinative of the Section 3(b)(2) exemption from registration issue. That is, since title belonged to the farmer at the time Silver Creek's crews were harvesting the crop, not only Silver Creek but also the farmer derived a benefit from the workers' harvesting activities since the farmer was not indifferent about whether the crops were harvested.

The amicus curiae, Nisei Farmers League, has an interest in this case in that approximately thirty of the members of the Nisei Farmers League are packing shed operators whose operations and relationships with their client-farmers are substantially identical to the Silver Creek situation. Said League members may be required to register if the Ninth Circuit's "title to crop/dual benefit" interpretation of the "solely for its own operation" language of the 3(b)(2) exemption is allowed to stand.

Further, the amicus curiae, Nisei Farmers League, has an interest in this case because approximately 1,300 of its remaining members are farmers who have an identical or substantially similar harvesting relationship with their

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[1]Regulation 41.17 is quoted infra.

packing shed operators. Said farmer members of the Nisei Farmers League are concerned because many of their packing operators have chosen to cease harvesting their crops rather than register under the FLCRA. Those farmer members are now in a position of having to locate large numbers of harvesting workers for short periods of time which is almost an impossible task. Packing shed operators (prior to the Silver Creek decision) were better able to obtain harvesting workers because said packing shed operators, by moving harvesting crews from client-farmer to client-farmer, were able to promise their workers almost year-round employment.

Also, many of the Nisei Farmers League's farmer members are concerned that under the "title to crop/dual benefit" interpretation of the 3(b)(2) exemption (utilized in the Ninth Circuit's Silver Creek decision) any sale of the crop growing on the tree by a farmer which involves an obligation upon the farmer to harvest and deliver the previously sold crop to the buyer may place said farmer in a position of having to register under the FLCRA.

II

ARGUMENT

A. In 1974 Congress Rejected The "Title To Crop" Test Which The Ninth Circuit Utilized In The Silver Creek Case For Determining Whether Or Not A Packing House Is Entitled To The Section 3(b)(3) Exemption From Registration. Whether The Farmer Or The Packing Shed Operator Holds Title To The Crop At The Time Of Harvest Is Therefore Not Determinative Of Whether The Packing Shed Operator Is Harvesting The Crop Solely For Its Own Operation

In this case, the Secretary of Labor seeks to enjoin packing shed operator Silver Creek from violating the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), 7 U.S.C. § 2041 et seq. The sole issue in this case is whether Silver Creek is a "farm labor contractor" within the meaning of Section 3(b) of the FLCRA, 7 U.S.C. § 2042(b), and thus subject to the registration provisions of that Act; or whether Silver Creek is entitled to the Section 3(b)(2) exemption from registration. Section 3(b) and 3(b)(2) state, in pertinent part, as follows:

> "Section 3: As used in this Act—
>
> (b) The term "farm labor contractor" means any person, who for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers[2] (excluding members of

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[2]Section 3(g) provides that the term "migrant worker" means an individual whose primary employment is in agricultural, as defined in Section 3(f) of the Fair Labor Standards Act of 1938, 29 U.S.C. 203(f), or, who performs agricultural labor as defined in Section 3121(g) of the Internal Revenue Code of 1954, 26 U.S.C. 3121(g), on a seasonal or other temporary basis.

his immediate family) for agricultural employment. Such term shall not include—

> (2) any farmer, processor, canner, ginner, packing shed operator, or nurserymen who personally engages in any such activity for the purpose of supplying migrant workers solely for his own operation".

Silver Creek and the Department of Labor agree that Silver Creek is a "packing shed operator" within the meaning of Section 3(b)(2). The parties also agree that the harvest workers whom Silver Creek employs upon its client-farmers' property are "migrant workers" within the meaning of Section 3(b)(2).[3] The Ninth Circuit Court of Appeals itself recognized that Silver Creek, even though it is a corporation, can and does, "personally hire" agricultural laborers. The only issue raised by Petitioner Silver Creek, therefore, within its Petition For Writ of Certiorari (which it filed with this Honorable Supreme Court on August 14, 1980), is whether Silver Creek's hiring of harvesting workers is done "solely for [Silver Creek's] own operation", so as to be excluded under Section 3(b)(2) from the definition of a "farm labor contractor".[4]

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[3]Said harvesting workers are certainly agricultural workers within the meaning of Section 3(g) of the FLCRA.

[4]Note that the farmer-members of the Nisei Farmers League have a vested interest in the Silver Creek decision because Section 4(c) of the FLCRA provides that no farmer shall engage the services of any farm labor contractor to supply farm laborers unless he first determines that the farm labor contractor possesses a certificate from the Secretary of Labor. A farmer who hires a farm labor contractor who does not possess a certificate of registration from the Secretary of Labor is subject under Section 9(b) of the FLCRA to a civil monetary penalty of not more than $1,000.00 for each violation of the FLCRA.

The purpose of the Farm Labor Contractor Registration Act of 1963 (both before and after the 1974 amendments thereto), is to regulate "middlemen" who exploit both migrant workers and . . . "primary users of such labor—farmers, growers, and packing shed operators . . .". [See, Senate Report No. 93-1295, P. L. 93-518 which appears within 1974 *U.S. Code Cong. & Admin. News,* 6441-6451, at 6442. See also, Senate Report No. 202 reported at 1964 *U.S. Code Cong. & Admin. News* 3690-3706. Further see, Section 2 of the FLCRA, 7 U.S.C. § 2041.]

Therefore, the issue can be re-stated as whether Silver Creek's hiring of harvesting workers was done in its capacity of a middlemen between the workers and farmers, or for Silver Creek's own operations.

1. The Fact That The Section 3(b)(2) Exemption Lists Both "Farmers" As Well As "Packing Shed Operators" Who Hire Agricultural Workers Solely For Their Own Operations Cannot Be Ignored

Congress at Section 3(b)(2) listed both "farmers" as well as "packing shed operators" who may be exempt from registration under Section 3(b)(2) when they recruit, solicit, hire, furnish or transport agricultural workers for "agricultural employment"[5] for the purpose of supplying agricultural workers solely for his own operation.

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[5]Agricultural employment is defined under Section 3(b) of the Act as meaning employment in any service or activity included within the provisions of Section 3(f) of the Fair Labor Standards Act of 1938, 29 U.S.C. 203(f), or Section 3121(g) of the Internal

Packing shed operators employ two classes of workers. They employ industrial workers covered by the Labor Management Relations Act of 1947, 29 U.S.C. § 141 et seq., who work inside of the processing or packing plant. They also employ outside harvesting field workers who work picking and hauling the crops of their farmer-clients. Said harvesting workers are not covered by the Labor Management Relations Act of 1947. Instead, they are covered by the California Agricultural Labor Relations Act. [See, California Labor Code § 1140.4(b) and (a), and Labor Management Relations Act § 2(3).]

Therefore, Congress clearly intended the Section 3(b)(2) exclusion from registration to apply, under certain circumstances, to packing shed operators employment of agricultural harvesting and hauling workers for their own operation. However, the "title to crop/dual benefit" test promulgated by the Secretary of Labor in Regulation 41.17 and accepted by the Ninth Circuit Court of Appeals in the instant case, results in the conclusion that only a packing shed operator's indoor processing or packing employees are entitled to the 3(b)(2) exemption from registration. But that conclusion is absurd. That conclusion renders the Section 3(b)(2) exemption meaningless since inside processing and packing employees are industrial (not agricultural) employees who do not even fall within the general definition of the type of employees which can possibly make an employer a labor contractor under Section 3(b).

Revenue Code of 1954, 26 U.S.C. 3121(g) and the handling, planning, drawing, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

The Ninth Circuit Court of Appeals' interpretation of Congress' intent (when Congress established both a farmer 3(b)(2) exemption and a packing shed operator 3(b)(2) exemption) is in complete disregard of the realities of the operation of a packing shed business. Almost every packing shed operator in the California agricultural community is a "factor or commission merchant" (as defined under California Civil Code § 2026) who picks, hauls, packs, sells, and ships agricultural commodities grown and owned by its farmer-clients. *The real issue, therefore, for this Honorable Court to determine, is whether the packing shed operator's hiring of an agricultural employee in a particular case is done for harvesting that is part of the packing shed operator's own operation or for harvesting that is done by the farmer, using the packing shed operator as a middleman to supply agricultural workers.*

In so determining whether the hiring in a particular case is done for harvesting that is part of the packing shed operator's own operation, the Secretary of Labor relied on Regulation 41.17 which the Ninth Circuit Court of Appeals ruled requires a "title to crop/dual benefit" test. Said Regulation reads in relevant part as follows:

> (a) The Act was intended to regulate the practices of all persons functioning in the capacity of middlemen between the farmer, processor, etc., and the migrant workers. Thus, the exclusion applies only in those situations where the normal functions of the middlemen are performed by the farmer, processor, etc., solely for himself and should any of these persons perform in the role of middlemen, such as where the activities are in behalf of other employers, producers,

> processors, etc., in addition to himself, the exclusion would not apply. . . .
>
> (b) For example, [1] if a processor solicits, recruits, hires, furnishes, or transports migrant workers to be used in the harvesting of crops which he has in fact purchased through a contract with the farmer, and under whose contractual terms title to the crop is vested in the processor before the crop has been harvested, the exemption would apply, because the processor would be supplying migrant workers solely for his own operation. [2] Where the processor or any other person acts as a conduit through whom the migrant workers are made available to third parties, even though the crops on which the migrant workers are employed are the subject matter of a contract to purchase (as distinguished from a contract of sale) and will be used in the processing, canning, etc., the exception does not apply."

This Regulation is *not* authority demanding the utilization of the "title to crop/dual benefit" test whenever a Court considers the problem of whether the hiring in a particular case is done for harvesting that is part of the packing shed operator's own operation or for harvesting that is done by the grower, using the packing shed operator as a middleman to supply migrant workers.

Actually Regulation 41.17 adds no assistance to the Court's determination whatsoever. Let us consider the two examples, in reverse order, which are contained within paragraph (b) of Regulation 41.17 upon which the Secretary of Labor so heavily relies.

The second example merely states the problem of whether the processor is in fact acting as "a conduit through whom

the migrant workers are made available to third parties", and it notes that a processor may be a "conduit" even when the crops are the subject of a contract to purchase (although he could not be a conduit where the crops are the subject of a contract of sale giving the packing shed title to the crop prior to harvest). The second example does not in any way give this Court guidance as to when a packing shed operator should be considered a middleman/conduit versus when the packing shed operator's utilization of harvesting crews should be considered solely for his own operation.

The first example is superfluous and of no assistance to this Court's consideration of the problem. It is superfluous because if the packing shed operator had purchased the crops prior to harvest, then the packing shed operator would be a "farmer" engaged in hiring migrant workers for his own harvesting operations and clearly entitled to Section 3(b)(2) exclusion.

The Secretary of Labor would have this Honorable Court, as did the Ninth Circuit Court of Appeals, rule that a packing shed operator is only entitled to a Section 3(b)(2) exclusion when he owns title to the crop prior to harvesting said crop so that the farmer does not also receive a benefit by the packing shed operator's harvesting operation. But that "title to crop/dual benefit" test ignores the fact that Section 3(b)(2) creates an exemption for *both* packing shed operators and farmers. To use the "title to crop/dual benefit" test changes Section 3(b)(2) into only an exclusion for farmers and never an exclusion for a packing shed operator who is not operating as a farmer.

Congress must have in fact intended that packing shed operators would be entitled to a Section 3(b)(2) exclusion from registration (when said packing shed operators were functioning in capacities other than as farmers) since Congress utilized both the words "farmer" as well as "packing shed operator" when it listed the individuals who would be entitled to the 3(b)(2) exemption when supplying workers solely for his own operation.

Since the first example is superfluous, Regulation 41.17 does not state that title to crops at the time of harvest is determinative of the Section 3(b)(2) issue for packing shed operators. (Rather it merely indicates that if a packing shed operator were to acquire title to the crops prior to harvesting them he would be acting as a farmer and therefore exempt under the 3(b)(2) farmer exemption.) To the extent that Regulation 41.17 could possibly be interpreted to state that title to the crops at the time of harvest is determinative, said interpretation was subsequently explicitedly *disapproved* by Congress:

> "The Committee wishes to clarify the phrase 'solely for his own operation' as used in section 3(b)(2) of the Act. The Committee intends that the application of this provision *shall not necessarily depend on where title to the commodities involved rests at the time [of harvest], but shall in the future depend on a full consideration of the economic realities of agricultural production and processing.*" (Emphasis added). (Senate Report No. 93-1295, 1974 *U.S. Code Cong. & Admin. News* 6441, at 6447).

Congress further indicated that title to the crops at the time of harvest is not determinative when, after the

Secretary of Labor promulgated Regulation 41.17, Congress indicated that it was its intention to include within the 3(b)(2) exemption for farmers any person who is a farmer within the meaning of Section 3(f) of the Fair Labor Standards Act, *including grove care contractors* who perform all of the farming operations for fruit grove owners *but never acquire title* to the crop.

> "It is also the intention of the Committee to include within the personal exemption for agricultural operators (§ 3(b)(2) of the Act) any person who is a farmer within the meaning of Section 3(f) of the Fair Labor Standards Act. Thus, for example, grove care contractors who perform all of the farming operations for fruit grove owners required prior to harvest in producing a crop of fruit from the owners groves have been considered "farmers" within the meaning of the Fair Labor Standards Act (opinion of the Administrator on advice of the Solicitor of Labor, April 18, 1970, BNA-WHM 91:858r) and would not be deemed farm labor contractors by virtue of any personal engagement by them in activities solely for performance of their own farming operations in the groves of the owners with whom they have contracted." Senate Report No. 93-1295, 1974 *U.S. Code Cong. & Admin. News* 6441, at 6447.

It is therefore obviously Congress' intent that this Honorable Court shall not consider title to the crops at the time of harvest as determinative of the Section 3(b)(2) exemption. Instead, Congress wishes this Honorable Court to make a determination in "full consideration of the economic realities of agricultural production and processing." [Senate Report No. 93-1295, 1974 *U.S. Code Cong. &*

Admin. News 6441, at 6447.] As stated within *Usery v. Paramount Citrus Ass'n, Inc.*, 475 F. Supp. 700 at 705 (1979):

> "These 'economic realities of agricultural production and processing' include a wide range of circumstances, among them considerations of economy of operations, competitive influences, financial risks, in the prevalent practices in a given agricultural community. No one of these considerations should be determinative in itself, but they are guide posts to be used in determining whether a given operator's hiring of migrant workers is done for his own operation or as a middleman."

The economic realities in the instant situation indicate that Silver Creek only harvests those melon crops that it has contracted to pack and sell. Silver Creek exerts substantive control over the planting and care of those crops which it has contracted to pack and sell. And Silver Creek completely controls the harvesting process itself. Silver Creek supervises and controls the entire harvesting, hauling, packing, selling and shipping operation. Silver Creek's farmer-clients exercise no control and have no right to control any of these operations. Therefore, the conclusion is inescapable that Silver Creek is a vertically integrated business, whose harvesting activities are "solely" for its own operation. Silver Creek is, therefore, entitled to the Section 3(b)(2) exemption from registration.

B. If This Honorable Court Does Not Reject The Title To Crop Test, The Application Of That Test To The Section 3(b)(2) Exemption Will Lead To Absurd Results For The Members Of The Nisei Farmers League

If the Ninth Circuit Court of Appeals ruling that the title to the crop at the time of harvest is determinative is not overruled by this Honorable Supreme Court, then numerous farmer members of the Nisei Farmers League may be required to register. These farmers commonly sell their crops to a processor prior to harvest and subsequently (for an additional fee) harvest and deliver that crop to the processor. Since the farmer in this situation is harvesting a crop which he grew but no longer retains title, the Secretary of Labor (as supported by the Ninth Circuit Court of Appeals' decision herein) may contend that the 3(b)(2) exemption from registration is not available. Such a result would be absurd since the Congressional history clearly indicates Congress' intent is not to require farmers to register.

Also, the Ninth Circuit Court of Appeals utilization of the title to crop at time of harvest test for determining when a packing shed operator is entitled to the 3(b)(2) exemption does not recognize the realities of the California agricultural community. Many of the Nisei Farmer League members who are packing shed operators sometimes acquire title to a client-farmer's crop prior to harvest. But on those occasions, the amount of payment for having so acquired title is often determined by the amount of tonnage subsequently harvested. In other words, the Ninth Circuit Court of Appeals should not have assumed that

merely because a packing shed operator acquires title to a crop prior to harvest that therefore the farmer-grower is no longer interested in the amount of crop subsequently harvested by the packing shed operator.

Further, the Ninth Circuit Court of Appeal's utilization of the "title to crop" test will sometimes require farmers and their packing shed operators to simultaneously both register. For example, packing shed operator members of the Nisei Farmers League sometimes buy fruit prior to harvest from farmer members of the Nisei Farmers League. The packing shed operator in the height of the harvest season, even after he has paid cash to acquire title to the crop, will sometimes ask the grower to pick and haul the crop (for an additional fee) to the packing shed. The grower often agrees to perform that additional responsibility but will ask the packing shed to send him harvest workers. The packing shed operator (who at the height of the harvest season is short of supervisors and picking and hauling equipment but has enough field laborers) will deliver those field laborers to the grower. Then the grower will, for a fee, supervise the harvesting and delivery operation with his own equipment. Under this situation, the Department of Labor may use the Ninth Circuit Court of Appeals decision to require both the grower and the packing shed operator to register by denying both of them the 3(b)(2) exclusion. Such would, of course, be contrary to Congressional intent.

III

CONCLUSION

It is therefore respectfully submitted that this Honorable Court should reverse the Ninth Circuit Court of Appeals' decision and instead rule that Silver Creek is entitled to a Section 3(b)(2) exemption. The economic realities of agricultural production and processing indicate that the hiring of harvesting workers by a packing shed operator (who only harvests the fruit of client-farmers who have agreed to allow said packing shed operator to pack and sell the fruit) is done for harvesting that is part of the packing shed operator's own operation; and is not done for harvesting by the grower using the packing shed operator as a middleman to supply workers.

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